

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

Earthy, LLC

Civil Action No. 1:16-cv-04934

Plaintiff,

v.

BB&HC, LLC,

Defendant.

MOTION FOR LEAVE TO FILE SECOND AMENDED COUNTER-CLAIM

NOW COMES Defendant BB&HC, by and through its counsel, and for its Motion for Leave to File Second Amended Counter-Claim states the following:

1. Subsequent to the 30(b)(6) deposition of Counter-Defendant and Counter-Defendant's production of correspondence concerning the creation and use of the asserted EARTHY and EARTHY ORGANIC trademarks, it has become clear that third party John Vlahakis is the sole owner, officer, and financier of Earthy, LLC and personally directed and participated in the infringing activity alleged in Counter-Plaintiff's Counter-Claim.
2. Further, John Vlahakis undertook these infringing actions in his individual capacity while employed by third party Venus Laboratories.
3. Under Fed. R. Civ. P. 15(a)(2), "The court should freely give leave [to amend] when justice so requires." *See generally Foman v. Davis*, 371 U.S. 178, 182 (1962) (reversing denial of leave to amend by citing to Rule 15(a)(2)'s mandate to freely give leave to amend and stating "this mandate is to be heeded").

4. Leave to amend is ‘inappropriate where there is undue delay, bad faith, dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of the amendment.’” *Feldman v. American Mem. Life Ins. Co.*, 196 F.3d 783, 793 (7th Cir. 1999) (quoting *Perrian v. O’Grady*, 958 F.2d 192, 194 (7th Cir. 1992)).
5. Where an amendment to a party in his individual capacity does not “inject radically new issues or witnesses into the case,” however, leave to amend will be granted. *DeLuca v. Winer Indus., Inc.*, 857 F. Supp. 606, 608 (N.D. Ill. 1994).
6. Counter-Plaintiff requests leave to file a Second Amended Counter-Claim to allege claims against John Vlahakis in his individual capacity and to include Counter-Plaintiff’s newly granted registered trademark.
7. Since discovery has closed, and because discovery has been taken from Venus Laboratories, Earthy, LLC, and third party John Vlahakis in his individual capacity, this amendment will not require the reopening of discovery or unduly prejudice Plaintiff or third party John Vlahakis.
8. Consequently, Counter-Plaintiff requests that the Court grant its Motion for Leave to File Second Amended Counter-Claim. See Exhibit H, Second Amended Answer and Counter-Claim.
9. Counter-Plaintiff relies on the attached brief in support.

Dated: April 27, 2017

/s/ John Di Giacomo
John Di Giacomo
Revision Legal, PLLC
109 E. Front St.

Suite 309
Traverse City, MI 49684
Phone: (231) 714-0100
Fax: (231) 714-0200
Email: john@revisionlegal.com
Attorneys for Defendant BB&HC, LLC

CERTIFICATE OF SERVICE

I hereby certify that, on April 27, 2017, I electronically filed the foregoing Motion for Leave to File Second Amended Counter-Claim using the ECF system, which will send notification of such filing to the following:

Bernard A. Henry
Rieck and Crotty, P.C.
55 West Monroe Street, Suite 3625
Chicago, Illinois 60603

/s/ John Di Giacomo
John Di Giacomo
Revision Legal, PLC
109 E. Front St.
Suite 309
Traverse City, MI 49684
(231) 714-0100
john@revisionlegal.com